IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH and GEORGE HENRY WARREN, Jr., Trustees,

Appellants,

vs.

TAX ASSESSORS OF THE CITY OF NEWPORT; and EDWARD L. LEAHY, Tax Administrator of the State of Rhode Island.

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Opinions Below.

The opinion of the Superior Court of the State of Rhode Island, from which the appeal to the Supreme Court of Rhode Island was taken, appears in the Record at pages 34 to 37. This opinion has not been reported. The opinion of the Supreme Court of Rhode Island (R. 39) is reported in 47 Atlantic Reporter, 2d, 625.

Jurisdiction.

The date of the final judgment of the Superior Court for the County of Newport, in the State of Rhode Island, herein sought to be reviewed, was July 2, 1946 (R. 49). A Petition for Allowance of the Appeal to the Supreme Court of the United States, the Assignments of Error and Prayer for Reversal (R. 50) were presented to the pre-

siding Justice of the Superior Court of the State of Rhode Island on August 7, 1946, and the order allowing the appeal (R. 51) was entered by the presiding Justice of the Superior Court of the State of Rhode Island on August 7, 1946. The jurisdiction of this court is conferred by Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925. This court entered an order noting probable jurisdiction in this case on October 21, 1946 (R. 55).

Questions Presented.

The question in this case is whether, under the provisions of sub-division Fifth of Section 9 of Chapter 30 of the General Laws of Rhode Island of 1938, George Henry Warren, Jr., one of two trustees, is, because he happens as an individual to reside in Rhode Island, liable to be taxed as trustee of a trust on one-half of the intangible property located in and administered solely in New York under the will of his father, a New York resident, for the benefit of a New York resident; his co-trustee, William Greenough, being likewise a New York resident.

Statute Involved.

The statute involved (General Laws of Rhode Island, 1938, Chapter 30, Section 9 Subdivision Fifth) imposes an ad valorem tax as follows:

> "Fifth. Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such executor, administrator or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

The tax assessed is as follows:

"Warren, George H. Jr. Trustee u/w of George H. Warren for Constance Whitney Warren. Intangible Personal Property $12,500. Tax $50." (R. 3, 14)

and was a tax on one-half of the securities (500 shares of Standard Oil Co. of N. J.) held by the trustees. (R. 19, 27)

The trustees, by a check signed by both of the trustees, paid the tax under protest. (R. 32)

Statement.

The undisputed facts are contained in the petition filed in the Superior Court of the County of Newport, Rhode Island, by the appellants herein (R. 1-5), and are as follows:

1. That George Henry Warren, late a resident of the City, County and State of New York, died on the 3rd day of June, A. D. 1943, leaving a last will and testament dated April 19, 1943, and which, by a decree of the Surrogate's Court of the County of New York, entered on the 30th day of June, 1943, was duly admitted to probate, and letters testamentary thereon were issued to your petitioners, the executors named therein; said Surrogate's Court also, on June 30, 1943 granted Letters of Trusteeship (R. 33) to George Henry Warren, Jr. and William Greenough of the trusts created by said will. By a decree of the Probate Court of the City of Newport, in the County of Newport and State of Rhode Island, entered on the 15th day of November, A. D. 1943, a copy of said will authenticated under the Act of Congress was ordered filed and recorded, and letters testamentary in Rhode Island were issued to your petitioners, the executors named therein.

2. That said will provided in Clauses Fifth and Sixth in part as follows:

"I give and bequeath unto my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their

successors the sum of Four Hundred Thousand Dollars in trust nevertheless to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my daughter Constance Whitney Warren, for and during her natural life and upon and after her decease or in the event my said daughter shall die before me then to assign transfer and pay over the said principal sum of Four Hundred Thousand Dollars so held in trust for her as aforesaid or the securities in which the same may then be invested and I give and bequeath the same unto her then living children in equal shares and unto the issue of any child of hers who may have previously died leaving issue then surviving such issue however to take the part or share which his her or their parent would have taken if living per stirpes and not per capita.

"In the event however there shall be no child or children or issue of a deceased child or children of my said daughter then surviving then to hold and continue to hold the said sum of Four hundred thousand dollars upon the further trust to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my son George Henry Warren junior during his natural life, and upon and after his decease then to assign transfer and pay over the said principal sum of Four hundred thousand dollars or the securities in which the same may then be invested and I give and bequeath the same unto his issue per stirpes and not per capita."

"Sixth: • • • I do likewise give and bequeath to my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the further sum of Two hundred thousand dollars in augmentation of and to be added to the principal of the trust created by the fifth clause of this my will for the benefit of

my daughter Constance Whitney Warren to be held and disposed of by them upon the same terms and conditions as set forth in said fifth clause."

Said will further provides in clause Sixteenth:

"Sixteenth: I hereby nominate constitute and appoint my son George Henry Warren junior and William Greenough the husband of my niece Charlotte Warren Greenough to be the executors of and trustees under this my will.

"Upon the decease of either my said son or the said William Greenough or in the event either my said son or the said William Greenough shall resign or become for any reason disqualified to act as executor of and trustee under this my will before my estate has been fully administered or the trusts hereby created have been fully executed then I do hereby nominate constitute and appoint United States Trust Company of New York and its successor as executor of and trustee under this my last will and testament.

"It is my will and I direct that no bond or other security shall be required by any surrogate probate court or judge of any court of or from my said executors or trustees under this my will or either of them for the performance of their duties under this my will or on account of the non-residence of any such executor or trustee or either of them." (R. 55)

3. That William Greenough, one of the trustees appointed in and duly qualified as such under said Clauses Fifth and Sixth respectively, is a resident of the State of New York, George Henry Warren, Jr., the other trustee named therein and duly qualified as such is a resident of said City of Newport; that Constance Whitney Warren, the beneficiary for life under said trust is a resident of the State of New York; and that all of the intangible personal property constituting the principal of said trust fund was, at the time of the death of said George Henry Warren, and on the 15th day of June, 1944, at 12 o'clock noon, and at all times since the death of said George Henry Warren was and

is now located in the City, County and State of New York and never has been located in the City of Newport in the State of Rhode Island, and is and always has been beyond the jurisdiction of the State of Rhode Island and has not received or enjoyed any benefit or protection from the laws of the State of Rhode Island.

4. That the trustees of said trust fund hold said trust fund, so located in the State of New York, as joint tenants, and their title and interest in said fund as such joint tenants are not severable or divisible for the purposes of taxation or otherwise, and their powers must be exercised as a unit. (R. 24) Quoting Section 66 of New York Real Property Law as follows:

> "Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy; but every estate, vested in executors or trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereinafter granted or devised."

5. That George Henry Warren, Jr., as an individual resident in Rhode Island, does not, as trustee, exercise his powers as trustee in Rhode Island, nor does he, as trustee, enjoy any benefits or protection from the laws of Rhode Island.

Specification of Errors to be Urged.

The Supreme Court of Rhode Island erred:

(1) In failing to sustain appellant's contention that the Statute of Rhode Island, held to be applicable, is repugnant to the Fourteenth Amendment to the Constitution of the United States.

(2) In holding that because George Henry Warren, Jr., one of the two co-trustees of the trust, was a resident of Rhode Island, one-half of the trust estate was property in Rhode Island and therefore subject to the taxing jurisdiction of Rhode Island.

(3) In holding that the State of Rhode Island had jurisdiction to impose the tax herein questioned on the sole basis of the legal fiction that the situs of the trust property followed the residence of George Henry Warren, Jr., one of the two co-trustees, in spite of the settled statutory Rule of Property, which prevails both in Rhode Island and New York, that where co-trustees are appointed to administer a trust they hold as joint tenants, form one collective trustee, and are required to act as a unit.

(4) In entering the order affirming the judgment of the Superior Court for the County of Newport.

Summary of Argument.

Appellant's contentions may be briefly summarized by the following propositions:

(1) Rhode Island's *ad valorem* personal property tax on intangible personal property attempts to reach the principal or corpus of securities held by non-resident trustees in another state.

(2) The Supreme Court of Rhode Island in this case held that solely because of the fiction *mobilia sequuntur personam*, the tax situs of one-half of the corpus of the trust was attributable to George Henry Warren, Jr., as a resident of Rhode Island, and that the tax situs of one-half of the securities was Rhode Island.

(3) The entire corpus of the New York trust has its tax situs in New York, and not in Rhode Island.

(4) The tax, having been imposed upon one-half of the corpus which has its situs in New York, violates the Fourteenth Amendment.

ARGUMENT

I. Constitutionality

A.

The application of the above Tax Statute to the facts in this case by the decision of the Supreme Court of Rhode Island is unconstitutional as in contravention of the provisions of the Fourteenth Amendment.

(a) the intangible property of the trust is not within the territorial jurisdiction of Rhode Island; the tax is upon the fund and not upon the trustees;

(b) the fact that George Henry Warren, Jr., one of the co-trustees, is personally in Rhode Island does not make him a trustee in Rhode Island, or make the trust property amenable to the jurisdiction of Rhode Island;

(c) half of the trust property is not owned by George Henry Warren, Jr. as trustee, it being the rule of law both in Rhode Island and New York that trust property held by two or more trustees is jointly owned, and that the trustees must act as a unit;

(d) as admitted by the Supreme Court of Rhode Island, nothing appears on the record to show that Rhode Island has as yet actually extended any specific benefit to or protection over the resident trustee or the trust fund. (R. 47) The potential willingness of the Rhode Island courts to afford benefit and protection in the future is not sufficient to render the imposition of the tax here controverted free from the prohibition of the Fourteenth Amendment.

Petitioners do not claim unconstitutionality on the ground of double taxation. Their claim rests on the prin-

ciple that the State of Rhode Island renders no equivalent for the tax to George Henry Warren, Jr. as trustee and the state renders no protection and extends no benefit to the trust fund.

A state may not tax property which is not within its territorial jurisdiction.

Anthony v. *Caswell*, 15 R. I. 159;

State Tax on Foreign Held Bonds, 15 Wall. 300;

Union Transit Co. v. *Kentucky*, 199 U. S. 194;

Frick v. Pennsylvania, 268 U. S. 473-488;

R. I. Hospital Trust Co. v. *Doughton*, 270 U. S. 69;

Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83 (50 S. Ct. Reporter 59).

In the early case of *Anthony* v. *Caswell*, 15 R. I., 159 (1885), where the *cestui que* trust resided in Rhode Island, but the trustee resided in New York, and the trust fund was not in Rhode Island, the court held that the tax against the New York trustee in the Town of Jamestown, Rhode Island, where the beneficiary resided, was illegal. In construing this statute the court said:

> "The provision, taken literally, extends to trustees wherever resident, and to property wherever situated, if only the cestuis que trustent reside in this state. The statutes, however, must be understood to extend only so far as they are operative, namely, to persons and things within the State, or to persons subject to the jurisdiction of the State by reason of their domicil. An inspection of our statutes will show that they do not in express terms limit their own operation to the State, the limitation being implied as a matter of course. . . . Our conclusion is, that the purpose of Section 12 is simply to determine where property held in trust shall be taxed, not to extend the liability to taxation."

In reaching this conclusion the court expressed and followed a fundamental rule of statutory construction that no

legislation is presumed to operate outside the territorial jurisdiction of the state or country enacting it. To the contrary, the presumption is that the statute is intended to have no extra-territorial effect, but to apply only within the territorial jurisdiction of the state or country enacting it and an extra-territorial effect is not to be given to statutes by implication (50 American Jurisprudence, Tit. Statutes, Section 487, and cases cited).

A similar tax statute imposing an *ad valorem* tax on intangible personal property was passed upon by the Supreme Court of Massachusetts.

In *Newcomb* v. *Paige*, 224 Mass. 516; 113 N. E. 458 (1916), where the testator resided in New York, and created a trust of intangible personal property naming three trustees, one of whom only had a residence in Massachusetts. The trust res was in New York and never in Massachusetts. The beneficiary resided in New York and the estate was administered there.

The Massachusetts tax act was as follows:

> "St. 1909, c. 490, pt. 23: 'Fifth, Personal Property held in trust by * * * trustee, the income of which is payable to another person, shall be assessed to the * * * trustee in the city or town in which such other person resides, if within the commonwealth; and if he resides out of the commonwealth it shall be assessed in the place where * * * trustee resides; and if there are two or more * * * trustees residing in different places, the property shall be assessed to them in equal proportions in such places. * * * If the * * * trustee is not an inhabitant of the commonwealth, it shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to * * * trustee under a testamentary trust in any other state.' "

The Court held that the Massachusetts tax act did not apply to the trust fund, saying at page 517:

> "This trust fund was invested in intangible securities, a part of which are not subject to direct taxation

in the state of New York, and a part of which are so subject to taxation, and as to this part a tax was paid in that state for the year 1911. So far as taxable the fund as a whole is there subject to taxation. All the securities, documents and other evidences respecting the trust at all times since the creation of the trust have been kept physically in New York in the exclusive custody and control of the trustee there resident, by concurrent assent of all the trustees. *Under the law of the state of New York the trustees must act as a unit and all power possessed by them must be exercised by them as a body;* and the trust fund still forms a part of the estate of the testator, and if the trust should fail for want of takers, the property would become vested in the Supreme Court of New York to be distributed according to law. The law of New York relative to the taxation of personal property kept within that state in the hands of executors and trustees appointed by the court of that state is in substance that when "the will of a deceased resident of New York appoints as executors and trustees a resident of the state of New Jersey and two residents of the state of New York, the amount of an assessment for personal property under the control of the executors and trustees in the state of New York is not by reason of the nonresidence of the third executor and trustee limited to two-thirds of the amount of such personal property," but extends to the whole. People ex rel. Farmers' Loan & Trust Co. *v.* Wells, 94 App. Div. 463, 465, 87 N. Y. Supp. 745, 88 N. Y. Supp. 113, affirmed in 179 N. Y. 566, 71 N. E. 1136. We interpret this statement of the law of New York to mean that all personal property held by executors and trustees appointed by the courts of New York acting within their jurisdiction and actually situated in the state of New York is taxable there in case such property is held by executors or trustees one or more of whom reside in the state of New York and one or more of whom reside in another state. People ex rel. McHarg *v.* Gaus, 169 N. Y. 19, 61 N. E. 987." (Italics inserted.)

And the Court further said at page 519:

> "The provisions of clause 5 of § 23 of the tax act, read in the light of the entire act and of the general principles of law as to taxation, do not subject to a property tax here personal property held by several trustees, only one of whom is a resident of this Commonwealth, under appointment of the court of a sister State of the Union by virtue of the will of a testator resident in that State, to be executed according to its law and actually deposited and continuously kept in such foreign State in the hands of a co-trustee there resident, where it is subject to taxation and a tax there is paid on its account. The final sentence of the clause, to the effect that when the trustee is not a resident of this Commonwealth, the fund shall be 'assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to . . . trustee under a testamentary trust in any other State,' is some indication of a legislative purpose that a trust fund lawfully within the taxing jurisdiction of another State and there making a just contribution to the support of government, should not be made liable to another tax here."

The case of *Newcomb* v. *Paige* (*supra*) was decided in 1916 and the quoted statement of the New York Tax Law was correct at that time. However, all taxes on personal property, tangible or intangible, and whether owned by a resident or a non-resident of New York, were repealed in 1933. The Legislature had previously enacted a tax on the income of property (Laws of 1919, Chapter 627, as amended).

Under Section 3 of Article XVI of the Constitution of the State of New York, adopted November 8, 1938, intangible personal property shall not be taxed *ad valorem*, and intangible personal property within the State not employed in carrying on any business by the owner shall be deemed to be located at the domicile of the owner (if a non-resident), and if held in trust, shall not be deemed to be located in New York for purposes of taxation because of the Trus-

tee being domiciled in New York, unless the income of a non-resident of New York is the product of a New York business, or of New York real or tangible personal property. Such income of intangible personal property of a non-resident is not subject to the New York State Income tax (*People ex rel. Monjo* v. *State Tax Commission*, 218 App. Div. 1).

There are several other closely reasoned cases dealing with this subject. First, the case of *Lewis* v. *The City of Chester*, 60 Pennsylvania State Reports 325. In this case Jones of the City of New York died in 1852 leaving two children and a widow, Sarah J. Lewis. His will under which he appointed his widow executrix was proved before the Surrogate of the City and County of New York. Letters testamentary were granted to Mrs. Lewis and in 1855 she settled the final account of her administration of the estate in the Office of the Surrogate. The executrix was, by the decree on the accounting, ordered to keep a balance of the property invested and retain the same on trust pursuant to the trusts in the will.

The children lived with their mother since the decease of the testator in the Borough of Westchester, Pennsylvania, and a guardian ad litem was appointed by the Surrogate to attend to their interests as often as accounts of the defendant of the funds in her hands had been presented. All of the funds in the estate consisted of United States Bonds, Pennsylvania State Stock, Philadelphia City Bonds and certain moneys loaned on bond and mortgage in Pennsylvania and in Delaware and Maryland. The court below held that the defendant was liable for the entire assessment in the County of Chester. The Supreme Court held that to reach the trustee it must be shown that she was amenable as trustee for something she holds that our law can reach in her hands. • • • "As executrix and trustee under the law she derived all her power from the will and the laws of New York and none whatever from Pennsylvania. • • • It seems to be clear, then, as argued by the plaintiff in error, and on the authorities cited, that the administration and the control and distribution of the

trust estate, belongs wholly to the law and to the authorities of New York. * * * As *Trustee* by virtue of her office of executrix, Mrs. Lewis is unknown to our law; while Pennsylvania has neither the wish nor the power to interfere with anything within the exclusive jurisdiction of New York." After holding that as to the money invested on mortgage in Pennsylvania, the trustee clearly held her investment not by the law of New York but by a personal contract protected solely by the Pennsylvania law and that as to such contract which characterized her as a trustee in fact by her own act and drew to it the protection of Pennsylvania law. To this extent only she was liable to taxation as the price she must pay for the privilege.

In *Dorrance's Will*, 3 Atlantic Reporter, 2nd Series, 682; 333 Pa. 162; 127 A. L. R. 366, the Supreme Court of Pennsylvania dealt with a similar situation in January, 1939, laying down three fundamental propositions:

> (1) When the administration of a trust is vested in co-trustees, they all form but one collective trustee, and they must, therefore, execute the duties of office in their joint capacity;
>
> (2) Where the legal title to intangible personalty was in four trustees, three of whom were Pennsylvania residents, the fourth being a corporate trustee not engaged in business in Pennsylvania, and the trustees held the trust property as a unit in New Jersey, the trust property was not subject to a tax under a statute authorizing a tax on personalty held or possessed by any resident in his own right or as trustee;
>
> (3) Unless property is clearly within a taxing statute, it is not taxable.

The opinion shows that the Department of Revenue of the State of Pennsylvania assessed a personal property tax against intangible personal property held by four trustees appointed by the will of John T. Dorrance who died in 1930 in New Jersey. The assessment was on three-

quarters of the total value of the taxable property because three of the four trustees resided in Pennsylvania. It appeared that the property was evidenced by identified documents which were kept in New Jersey and that the trust was administered as a unit in that State according to its laws. It further appeared that none of the duties of the trustees was performed in Pennsylvania. Of the beneficiaries of the trusts one was a resident of New Jersey, another a resident of California, another a resident of Rhode Island, and four were residents of the State of Pennsylvania. The Court said at page 686:

> "The statute authorizes a tax on personal property owned, held or possessed by any resident in his own right or as trustee. The legal title to the property assessed is not in any resident of Pennsylvania but in the four trustees, one of them, the corporate trustee, not engaged in, and having no right to engage in business in Pennsylvania. They hold the trust property as a unit in the State of New Jersey. The ownership, holding or possession of the trust property is therefore not within the words of the statute; it contains no provision for dividing such trust property among resident and non-resident trustees for purposes of this tax. The taxing officers realize that the facts presented show a case that is not within the words of the statute but endeavor to bring the property within its provisions by construing it as if the legislature had said that in the case of resident and non-resident trustees a proportionate part should be taxed here. In so construing the statute, we think, for various reasons, that the taxing authorities and the learned court below reached a result which the statute does not allow. The familiar rule is that unless property is clearly within a taxing statute, it is not taxable. Arbuckle's Estate, 324 Pa. 501, 505, 188 A. 758."

In *Hutchins et al. Trustees* v. *Long, Commissioner of Taxation*, 272 Mass. 422; 172 N. E. 605, 71 A. L. R. Ann. 677 (1930), involved the Massachusetts income tax, which the Court held is a tax on *property* and not an excise tax.

The opinion of the Supreme Court of Massachusetts was delivered by Rugg, *C. J.*, and involved three cases of testators domiciled outside Massachusetts. In the first two cases each testator died a resident of New York. The two trustees in the first case are residents of Massachusetts. Two of the three trustees in the second case are residents of Massachusetts and the other a resident of Connecticut. In each of these two cases it is alleged that the trustees were appointed by the appropriate court of the State of New York, that under the laws of the State of New York said trust, having been created by the will of a resident of New York and proved and allowed in a court of that state, is a resident trust, and the trustees irrespective of the places of their residence became liable to the State of New York for an income tax on the gains and profits here sought to be taxed, that the gains taxed by the defendant were subject to taxation in that state and that taxes thereon have been assessed and paid, that the trustees, regardless of their residence, are accountable for the administration of their trusts to the courts of New York and are required by the law of New York *to act as a unit in holding, owning and dealing with the property of the trust.* • • • In no one of the complaints is there an allegation as to the place where the trust property is physically kept.

The tax law in question was General Laws, Chapter 62, Section 10, which provided:

> "The income received by estates held in trust by trustees, any one of whom is an inhabitant of the commonwealth • • • shall be subject to the taxes assessed by this chapter to the extent that the persons to whom the income from the trust is payable, or for whose benefit it is accumulated, are inhabitants of the commonwealth." (p. 681)

The court then went on to say that:

> "The first sentence of the section renders subject to the tax such income received by resident trustees or by trustees appointed by a court of this Commonwealth as is payable to or accumulated for the benefit

of inhabitants of this Commonwealth. Residence of the beneficiary within the Commonwealth is made the basis of the tax imposed by this sentence." * * * (p. 681)

Examination of the history of the parts of section 10 does not disclose any legislative purpose to make exceptions to its general phraseology. That section indicates an intention on the part of the General Court to tax all the income there described which is within its power to tax. It is as broad as the jurisdiction of the Commonwealth.

"The language of section 10 is broad enough to include taxation on income in the circumstances here in issue: 'But it is a rule of law that a statute which would be unconstitutional as applied to a certain class of cases, and is constitutional as applied to another class, may be held to have been intended to apply only to the latter class, if this seems in harmony with the general purpose of the Legislature.' KNOWLTON, *C. J., Attorney General* v. *Electric Storage Battery Co.*, 188 Mass. 239, 241, 74 N. E. 467, 468, 2 Ann. Cas. 631; *W. & J. Sloane* v. *Commonwealth*, 253 Mass. 529, 534, 149 N. E. 407, and cases cited. * * *

The allegations of the complaints in the first two cases, as we interpret them, show that the laws of New York establish the situs of the trusts for the purposes of taxation in that State. The averments that in the circumstances disclosed the trusts were 'resident trusts' in that State, *that the trustees, regardless of their residence, are subject to taxation in that State for the same gains as have been here taxed, that they have been taxed therefor and have paid that exaction, and that the trustees are required to act as a unit in holding, owning and dealing with the trust property, are sufficient to require the conclusion that by the laws of that State the situs of each of the trusts arising under the wills of deceased residents of that State continues for purposes of taxation within that sovereign power. The trust on which the property is held in each case was created by judicial decree of a court of another jurisdiction. Its terms can be enforced only*

by the courts of that jurisdiction. They cannot be enforced by courts of this Commonwealth even though all the trustees might reside here. *Jenkins* v. *Lester*, 131 Mass. 355. Interpretation of the terms of the will ordinarily is not within the province of our courts. *Emery* v. *Batchelder*, 132 Mass. 452. *There is nothing in these records to indicate that the trustees were obliged to resort to the courts of this Commonwealth for aid in the performance of any duty resting upon them under the trust.* *Bliss* v. *Bliss*, 221 Mass. 201, 109 N. E. 148, L. R. A. 1916A, 889. Compare *Baldwin* v. *Missouri*, 281 U. S. 586, 593, 597, 50 S. Ct. 436, 74 L. ed. 1056; *Farmers Loan & Trust Co.* v. *Minn.*, 280 U. S. 204, 208, 50 S. Ct. 98, 74 L. ed. 371. It is to be noted that the income tax established by our laws is a tax on property and not an excise tax. *In re Opinion of the Justices*, 220 Mass. 613, 624, 108 N. E. 570; *Hart* v. *Tax Commissioner*, 240 Mass. 37, 39, 132 N. E. 621; *In re Opinion of the Justices* (Mass.) 165 N. E. 900. We think that it is within the competency of New York to require that the intangible personal property of one of its deceased residents, whose will has been allowed by its court acting as the court of the domicil of the decedent, in the custody of fiduciaries appointed by such court to hold and administer that intangible personal property according to the will of the deceased resident and being so held and administered by such fiduciaries with responsibility for accounting to that court, shall have and continue to have a situs for taxation within its jurisdiction. Intangible personal property in these circumstances manifestly is within the jurisdiction of the courts of New York for all purposes of administration. The management, investment, safety, accountability, sale, transfer, control and final distribution of such property are vested in the courts of New York. See *Sewall* v. *Wilmer*, 132 Mass. 131, 136, 137. * * * The principle that the situs of intangible property held in trust, which in the absence of other controlling factors follows the person of the trustee, becomes inapplicable because by a dominating law its situs is fixed in the place where the testamentary trust was created and established and is being administered under direction of its court.

For all purposes incident to the cases at bar, its situs is immovably established within the State where the testamentary trust of which it is a part is being administered." (Italics inserted.)

Half of the trust property is not owned by George Henry Warren as trustee, it being the rule of law both in Rhode Island and New York that trust property held by two or more trustees is jointly owned, and that the trustees must act as a unit. In taxing the intangible personal property of the trust in this case, included in the tax bill (R. 27 10 Q), the assessors actually attempted to tax the joint interest of Mr. Warren's co-trustee, William Greenough, a resident of New York.

Section 66 of the Real Property Law of New York (which applies to personal property also) (R. 24) provides as follows:

> "Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy; but every estate, vested in executors or trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereinafter granted or devised."

This is strictly a New York trust created and administered exclusively under the laws of New York.

On this question, the Court in *Newcomb* v. *Paige*, 224 Mass. 516, 520 (*supra*), specifically stated:

> "When there are several trustees, one or more of whom is domiciled in the State of origin of the trust, and the corporeal custody of the securities of the trust is with that trustee at his domicil, and the title of the trustees is joint and their powers must be exercised as a unit, there is no such several ownership in one trustee resident outside the State of the establishment of the trust, but resident in Massachusetts, as brings

him within the scope of our tax law as to the trust property. St. 1909 c. 490, Part I, § 23. Under these circumstances he alone as resident of this Commonwealth does not hold the title as owner within the Commonwealth in such sense as to bring him within the terms of the tax act. He cannot exercise ownership as a resident in this Commonwealth, but only by conjoint action with his fellow trustees, none of whom are resident here, as to a fund in substance in the custody of the courts of another jurisdiction. His ownership is not of such character as to bring the taxable domicil of the trust within the terms of our law."

and in Dorrance's Will, *supra*, the Court said:

"They hold the trust property as a unit in the State of New Jersey."

The Rhode Island statute and Supreme Court recognize this principle although the Supreme Court in its opinion in this case made no reference to this Rhode Island law in discussing the question (R. 45). Chapter 431 of the General Laws of 1938, Sec. 1, provides:

"§ 1. All gifts, feoffments, grants, conveyances, devises or legacies, of real or personal estate, which shall be made to 2 or more persons, whether they be husband and wife or otherwise, shall be deemed to create a tenancy in common and not a joint tenancy, unless it be declared that the tenancy is to be joint, or that the same is to such persons and the survivors or survivor of them, *or to them as trustees or executors*, or unless the intention manifestly appears that such persons shall take as joint tenants and not as tenants in common."

Angel v. *Moni*, 45 R. I. 186, was an action to recover for use and occupation. One of the trustees agreed to accept a new tenant. The Court held that he could not bind his co-trustees. Said the Court:

"The law is well settled that where several trustees are appointed to administer a trust they form one col-

lective trustee, and that any action depending on the exercise of judgment or discretion on the part of the trustee requires the joint action of all."

This seems to be the settled law, adopted by all of the authorities.

Franklin Institution for Savings v. *People's Savings Bank*, 14 R. I. 632.

See also:

Bogert on Trustees, Vol. 1, Sec. 145;

Scott on Trusts, Sec. 194, note 1;

Restatement Trusts, Sec. 194;

Dorrance Will (*supra*).

In New York and Rhode Island, therefore, that trustees are joint tenants, required to act as a unit, is a statutory rule of property and in no sense a legal fiction.

The Rhode Island Court has no jurisdiction over George Henry Warren, Jr. in his official capacity.

This brings us to the next question,—whether because George H. Warren Jr. happens to be a resident of Rhode Island, he automatically becomes taxable as trustee of a New York trust of a New York fund for a New York beneficiary.

This important question was discussed and decided in the case of *Goodsite* v. *Lane*, 139 Fed. Rep. 593.

In that case, the testator, Griswold, died a resident of Connecticut. He named as trustees his widow and a son-in-law, both of whom resided in Ohio. All the trusts, which consisted wholly of securities, were in New York and never, at any time, in Ohio. Subsequently, the widow died and the Probate Court of Connecticut appointed as trustees one Spencer of New York and Moss of Ohio. Subsequently, by arrangement, Moss became sole trustee of one-half belonging to his mother-in-law, Mrs. Lane, a resi-

dent of Connecticut. The suit was brought by the Treasurer of Erie County, Ohio, to recover taxes for the years 1898 to 1913, inclusive.

The Ohio statute was as follows:

> "all property, whether real or personal, in this state, * * * and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state, shall be subject to taxation." Section 2731, Rev. St. 1890.

The Court held that the trustee in Ohio was not taxable as such, because, although a resident of that state, he was not there in his official capacity.

Said the Court at page 594:

> "Applying the rule mentioned *supra*, the state of Ohio taxes tangible property located in the State, because of its jurisdiction of the property; and it taxes intangible property located without the state, because of its jurisdiction of the person residing in the state who holds it. The property involved in this case had never been brought within the state of Ohio, and therefore could not be taxed upon the ground that it was tangible property within the state. The tax must be sustained, if at all, upon the ground that the estate was the property of a person residing in Ohio, who, being within the jurisdiction of the state, and owing it an obligation, might be compelled to contribute to its support out of his property, wherever located. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 498, 25 L. Ed. 558.
>
> The exaction must find its justification in the privileges and protection enjoyed in the state, under its laws, by the person taxed, in the capacity in which taxed. The person taxed must therefore be in the jurisdiction of the state not only personally, but officially, in the capacity in which he is taxed, and in that capacity must be enjoying the benefits referred to. In the case of a trustee, he must be exercising his office of trustee within the state, and be enjoying, as trustee, privileges of value to the estate, for which it is just the estate should pay. An examination of the

cases will show that, where this tax has been sustained, either the trust estate or the beneficiary, or the trustee, as trustee, was receiving benefits from the state, for which it was only fair the trustees should pay. Price *v.* Hunter (C. C.) 34 Fed. 355, 356; Borough of Carlisle *v.* Marshall, 36 Pa. 397, 402; Lewis *v.* County of Chester, 60 Pa. 325, 330; Guthrie *v.* Ry. Co. Co., 158 Pa. 433, 439, 27 Atl. 1052; Mayor of Baltimore *v.* Stirling, 29 Md. 48; Appeal Tax Court *v.* Gill, 50 Md. 377, 396; Mackay *v.* San Francisco, 128 Cal. 678, 61 Pac. 382; Trustees *v.* City Council, 90 Ga. 634; 17 S. E. 61, 20 L. R. A. 151. But where the estate and beneficiaries were outside the state, and the trustee only resided, and did not act as trustee within the state, the tax was not sustained. Hawk *v.* Bonn, Auditor, 6 Ohio Cir. Ct. R. 452; People ex rel. Darrow *v.* Coleman, 119 N. Y. 137, 23 N. E. 488, 7 L. R. A. 407. In the case of Gallup *v.* Schmidt, 154 Ind. 196, 56 N. E. 433, an estate was held taxable in Indiana, where the trustee was appointed, although he was a resident of New Hampshire, the court holding that, having been appointed in Indiana, he was to be regarded, in his capacity of trustee, as a resident of that state. Page 200 of 154 Ind., page 443 of 56 N. E. In the present case neither the trust estate nor the beneficiary nor the trustee, in any proper sense, was within the jurisdiction of the State of Ohio. The trust estate was in New York. The trustee was appointed in Connecticut, and acted wholly outside of Ohio. The fact that as an individual he resided in Ohio could not authorize the taxation of this foreign estate, which had received no benefit whatever from the laws of Ohio."

Said the court in *Lewis* vs. *City of Chester, supra,* at pages 329, 330:

"But as to the other property or money never brought into and not in fact held and invested under our laws, its *situs* remains in New York. *The fact that she is personally here does not make her a trustee here,* or amenable to our jurisdiction for property not brought here and subjected by her act to the operation

of our laws. *Not being a trustee under our law or amenable for property not accompanying her person, clearly there is no power to tax her for what she holds in New York, as a trustee, under the law of New York, and amenable only to the authority of that state.* The Act of 1845 does not extend to such a case, but must be confined to the property she has here, and has subjected to our law, by investing it here. All of the cases cited in support of the view of the learned court below, were those where the trustee was appointed or exercised his authority under our law: *West Chester* v. *Darlington*, 2 Wright, 157; *Bor. Carlisle* v. *Marshall*, 12 Casey 397; *Spangler* v. *York County*, 1 Harris 322; *School Directors* v. *James*, 2 W. & S. 568. In those cases Pennsylvania stood to the trustees as New York does to Mrs. Lewis in this, and therefore lawfully imposed the tax. Mrs. Lewis is liable for the taxes on the sum of $14,800 invested by her in mortgages in this state." (Italics inserted.)

In the *Union Transit Company* case, the Court said:

"The power of taxation indispensable to the existence of every civilized government is exercised upon the assumption of an equivalent rendered to the tax payer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance and to which it looks for protection, *the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax*, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law." (Italics inserted.)

The Court further said:

"'It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state, receives none of the protection for which the tax is supposed to be the compensation. * * * The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state but does not and cannot receive protection under its laws."

In the *Safe Deposit and Trust Company* v. *Virginia*, 280 U. S. 83, 50 S. Ct. 59, the Supreme Court held that a statute of a state which undertakes to tax things utterly beyond its jurisdiction conflicts with the Fourteenth Amendment of the United States Constitution: that tangible personal property permanently located beyond owners' domicil may not be taxed at the latter place; that intangible personal property may acquire a taxable situs where permanently located, employed, and protected, and that a trust estate transferred and delivered by a resident of Virginia to a Trust Company in Maryland and consisting of intangible property such as stocks and bonds without any person in Virginia having the right of enjoyment or right to remove *res*, was not subject to taxation in Virginia (under a property tax) regardless of the maxim, *mobilia sequuntur personam*. The Court further held that the securities were held by the trustee in Maryland; that nobody within Virginia had the present right to their control or possession, or to receive income therefrom, or to cause them to be brought physically within her borders and that they had no legal situs for taxation in Virginia unless the legal fiction *mobilia sequuntur personam is applicable and controlling*. The Supreme Court of Virginia, recognizing this, held the two beneficiaries domiciled

in Virginia really owned the fund and that by reason of the fiction its taxable situs followed them.

The Court went on to say that ordinarily it recognized that the fiction may be applied in order to determine the situs of intangible personal property for taxation (*Blodgett* v. *Silberman*, 277 U. S. 1, 48 S. Ct. 410), but that the general rule must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice whether through double taxation or otherwise.

> "Where the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded. It plainly conflicts with fact; the securities did not and could not follow any person domiciled in Virginia. Their actual situs is in Maryland and cannot be changed by the *cestuis que* trust."

Nothing decided by the Supreme Court of the United States since *Safe Deposit and Trust Co.* v. *Virginia* has altered the rule announced in the cases cited and from which we have quoted as to jurisdiction to tax by reason of power over the thing taxed and the extension of benefits or protection over the thing taxed or its owner. Nothing decided by the Supreme Court in *Curry* v. *McCanless*, 307 U. S. 357, 59 S. Ct. 900 and *Graves* v. *Elliott*, 307 U. S. 383, 59 S. Ct. 913, questions the fundamental propositions hereinbefore asserted. In support of this statement, we refer to the following:

In the case of *Utah* v. *Aldrich* (1942), 316 U. S. 174, 62 S. Ct. 1008, Mr. Justice DOUGLAS, delivering the opinion of the Court, said at page 181:

> "In line with our recent decisions in *Curry* v. *McCanless*, *Graves* v. *Elliott* and *Graves* v. *Schmidlapp* we repeat that there is no constitutional rule of

immunity from taxation of intangibles by more than one State. In case of shares of stock 'jurisdiction to tax' is not restricted to the domiciliary State. *Another State which has extended benefits or protection or which can demonstrate 'the practical fact of its power' or sovereignty as respects the shares* (Blackstone *v.* Miller, 188 U. S. page 205, 23 S. Ct. page 278, 47 L. Ed. 439) *may likewise constitutionally make its exaction.*"

Mr. Justice FRANKFURTER in his concurring opinion said at page 183:

> "Of course, the Due Process Clause has its application to the taxing powers of the States. • • • A State cannot tax a stranger for something that it has not given him. When a State gives nothing in return for exacting a tax it may be said that there is no 'jurisdiction to tax.'"

See also 54 Harvard Law Review, 949-954, "State Taxation in a National Economy," where the learned author says of recent United States Supreme Court decisions:

> "The current doctrine of the majority is that the due process clause does not bar 'double taxation.' *It sets up as the test of validity that the taxing state must furnish protection to or exercise control over the persons whose relationships give rise to intangible property rights.*"
>
> • • • "The view of the present majority that double taxation is not proscribed by the Fourteenth Amendment but that taxes which may be termed extra territorial are forbidden, completes a cycle of constitutional history."

It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the Court should adopt the construction which would uphold it. (*Nar-*

ragansett Electric Lighting Co. v. *Sabre*, 50 R. I. 288, 146A. 777, 147A, 668),

> "The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality." (11 Amer. Jurisprudence, Sec. 97, Title—Constitutional Law.)

> "The rule is also generally accepted that when a statute is broad enough to cover matters without the state as well as within, and as applied to matters without the state it would be unconstitutional, the Court may restrict the application to matters within the jurisdiction of the state." (11 American Jurisprudence Supra, Section 100, page 734.)

B.

The opinion of the Rhode Island Supreme Court admits that the State has not as yet actually extended any specific benefit to or protection over the resident trustee or the trust fund.

What benefits or protection to this trust fund have the State of Rhode Island or the City of Newport extended? How can the assessors demonstrate that the co-trustees who are joint tenants of the fund are not "strangers" to whom Rhode Island has given nothing? As stated by Mr. Justice FRANKFURTER in *Utah v. Aldrich* (*supra*):

> "When a State gives nothing in return for exacting a tax it may be said that there is no jurisdiction to tax."

BAKER, *J.*, writing the opinion of the Supreme Court of Rhode Island, filed May 31, 1946, from which this appeal is taken, says (R. bottom of page 47):

> "While it is true that nothing appears on the record to show that this state has as yet actually extended any specific benefit to or protection over the resident trus-

tee or the trust fund, other than by the decree of the probate court of Newport hereinbefore mentioned, nothing indicates that the state is not ready, willing and capable of doing so if requested. We know of nothing in our statutes or decisions which is of a discriminatory nature respecting a resident trustee of a trust originating in another state. Such trustee, in our opinion, would be entitled to the same benefits and protection from the laws of this state as would any other natural person here resident."

We maintain that it does not follow that because there is no discrimination against a non-resident trustee under the laws of Rhode Island that Rhode Island accords him any benefit or protection as trustee.

The decree of the Probate Court of Newport referred to by BAKER, *J.*, in the above quotation from his opinion was, as appears from the petition of the appellants for relief from the tax assessment (R. p. 1), a decree which ordered a copy of the will authenticated under the act of congress and filed and recorded. Letters Testamentary in Rhode Island were issued to executors named therein, who are the present appellants. The will was filed and recorded pursuant to Sections 10, 11, 12 and 13 of Chapter 572 of the General Laws of Rhode Island 1938, which provide as follows:

"Filing and Recording Foreign Wills.

"§ 10. Whenever the executor or any other person interested in any will, which has been finally proved and allowed in a probate court in any other of the United States, in any territory or district thereof, or in a probate court in any foreign country, shall produce a copy of such will and of the probate thereof, duly authenticated according to the act of congress, to any probate court in any town or city in this state where the testator had estate, real or personal, whereon the will may operate, and shall in writing request that the will may be filed and recorded in the office of the probate clerk in such town or city, the court shall assign a time and place for a hearing thereon.

"§ 11. Upon such request, the court shall cause notice thereof to be given in the same maner as if said will was presented to such court for probate, to the end that any person may appear and show cause why said copy should not be filed and recorded.

"§ 12. If, at the hearing, no sufficient cause is shown to the contrary, the court may order said copy to be placed on file and recorded: *Provided, however,* that, as to real estate in towns other than that in which said copy is filed and recorded, the title shall not pass, for the purposes of conveyance by the devisee, until a certified copy thereof is recorded in the records of land evidence in such other town or city in which any such real estate is situated; *and provided further,* that when any such copy is duly filed and recorded as aforesaid, title to lands devised by the will shall relate back to the death of the testator.

"§ 13. Whenever a copy of any will which has been finally proved and allowed in any probate court in any other of the United States, in any territory or district thereof or in any foreign country, shall be finally ordered to be filed and recorded in a probate court in this state pursuant to the 3 preceding sections, the filing and recording thereof shall be of the same force and effect as if the will had been originally proved and allowed in this state, subject to the provisos in § 12; and the probate court in which the copy of said foreign will is ordered to be filed and recorded may grant letters testamentary to the executor therein named, or letters of administration with the will annexed to such person as the court may deem fit, taking bond from such executor or person as in case of a will proved and allowed in such probate court."

The testator, as appears from portions of the will not included in the record on this appeal, owned real estate in Newport, Rhode Island, known as "Seafield", which under Article Eighth of the will he devised to his son, George Henry Warren, Jr., on a condition which the son did not accept, and under the terms of the will, the property thereupon fell into and became a part of the testator's residuary

estate. The executors filed and recorded the will under Chapter 572 above quoted, in order to comply with the provisions of Section 41 of Chapter 556 of the General Laws of Rhode Island 1938, which provides as follows:

> "§ 41. Title to real or personal estate shall pass by will when such will has been finally proved: *Provided, however;* that title to real estate situated in any town or city of this state other than that in which the will is proved, shall not pass by will for the purpose of conveyance by the devisee until, in addition to such probate, a copy of such will as proved, duly certified by the probate clerk, be recorded in the records of land-evidence in such other town or city. Any foreign will shall be recorded as provided in §§ 10 to 15, inclusive, of chapter 572, and § 1 of chapter 573, and when finally allowed shall operate to pass the title to all lands in that town or city where such will is duly recorded as aforesaid, and in any other town or city in which a duly certified copy thereof has been recorded in the records of land-evidence in such town or city and not otherwise: *Provided, however,* that when any such will is duly proved, or proved and recorded, as aforesaid, title to lands as devised thereby shall relate back to the date of the death of the testator.

The statute relative to the filing and recording of foreign wills effectuates Article 4, Section 1, of the Constitution of the United States, providing that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and that Congress may by general laws prescribe the manner by which such acts, records and proceedings shall be proved, and the effect thereof. It has never been contended that executors of a will of a non-resident decedent which has been proved in state "A" by the act of filing the foreign will and obtaining its recording in state "B", subject themselves to tax jurisdiction in state "B". So here the giving of full faith and credit by the state of Rhode Island and the Probate Court of Newport, Rhode Island, to the public acts and judicial proceedings of the Surrogate's Court in and for the County

of New York, in the State of New York, admitting the will of George Henry Warren to probate and issuing Letters Testamentary to George Henry Warren, Jr. and William Greenough, as executors, constituted no requirement of submission to taxation by the appellants herein of property, tangible or intangible, not within the jurisdiction of Rhode Island.

The act of congress referred to in Section 10 of Chapter 572 of the General Laws of Rhode Island, providing how the judicial proceedings of the court of a foreign state shall be authenticated, is Section 905, R. S. U. S. (Sec. 687 U. S. Code Annotated).

The admission of the New York will to probate in Rhode Island did not give the court in Rhode Island jurisdiction over the executors named in the will in their capacities as trustees, but the management of the estate in that respect remained with the New York court by which the first appointment was made. (*Joy* v. *Elton*, 83 N. W. 875; *Hutchins* v. *Long*, 272 Mass. 422, 427, 428.) The final quoted sentence from Judge BAKER'S opinion to the effect that a resident trustee of a trust originating in another state would be entitled to the same benefits and protection from the laws of Rhode Island as would any other natural person there resident, amounts to no more than the statement that such a trustee has the privilege of suing in the Rhode Island courts in respect of causes of action available to other natural persons resident in Rhode Island. As stated by counsel in the argument against the *"State Tax on Foreign-Held Bonds"*, reported in 15 Wallace, at page 311:

> "It is idle to say that the state of Pennsylvania accorded to him the right to sue in her courts; a similar right is accorded to foreigners by every civilized community on the face of the earth; but no one ever supposed that non-resident foreigners were thereby rendered taxable under the laws of every community which recognized such a right."

So it is idle to say that the State of Rhode Island, by passing a statute permitting the filing and recording of for-

eign Wills admitted to probate in another state, thereby rendered non-resident foreigners taxable on their intangible property in Rhode Island.

Clearly, George Henry Warren, Jr. as an individual residing in Rhode Island is not the same legal person as George Henry Warren, Jr. as trustee under the will of his father, by appointment of the Surrogate's Court in the County of New York, under the laws of the State of New York, and a judgment against him either in New York or in Rhode Island, as trustee, would not be *res adjudicata* against him as an individual in a subsequent action involving the same identical issue. (*Rathbone* v. *Hooney*, 58 N. Y. 463; *Landon* v. *Townshend*, 112 N. Y. 93; *Collins* v. *Hydorn*, 135 N. Y. 320; *First National Bank* v. *Shuler*, 153 N. Y. 163, 173.)

Obviously no such demonstrations by the State of Rhode Island of sovereignty over the trust fund or the resident and non-resident trustees are possible. The trust fund is not in Rhode Island and taxes which may be termed extraterritorial are forbidden by the XIV Amendment (*supra*). George Henry Warren, Jr. is not in Rhode Island as *trustee* and the Courts of Rhode Island cannot exercise control over him as *trustee* on the basis of the legal maxim *mobilia sequuntur personam*. This maxim ought not to be applied if so to do would result in inescapable and patent injustice. (*Safe Deposit and Trust Co.* v. *Virginia*, *supra*. See also dissenting opinion of BUTLER, *J.*, in *Curry* v. *McCandless*, 307 U. S., p. 381.) To allow one-half the corpus of the trust in this case to be taxed by Rhode Island would result "in giving the fiction an oppressive operation" (*Graves* v. *Elliott*, 307 U. S. 391, dissenting opinion of HUGHES, *C. J.*.) The State of Rhode Island cannot collect the tax assessed either by an action in rem against the securities owned by the trust or against the trustees in New York. (*State of Colorado* v. *Harbeck*, 232 N. Y. 71.) Furthermore, the courts of New York would decline to transmit the securities to Rhode Island to enable Rhode Island to enforce its tax laws. (*Matter of Martin*, 255 N. Y. 359; *Wisconsin* v. *Pelican Insurance Company*,

127 U. S. 265.) Rhode Island has no enforcible lien on the securities.

The State of Rhode Island has no power to prevent George Henry Warren, Jr. (a) from resigning as trustee at any time, or (b) from changing his residence to New York, or elsewhere, or (c) from in some way becoming physically or mentally disqualified to act as trustee. In case George Henry Warren, Jr., should die, resign or become disqualified to act as trustee, the United States Trust Company of New York would become trustee in George Henry Warren, Jr.'s place. (Will, Art. Sixteenth, R. 55) Thereupon, all pretense of jurisdiction of the State of Rhode Island to tax the trust fund would necessarily cease as both the trustees and the beneficiary of the trust would be residents of New York. Furthermore, the State of Rhode Island cannot control the contingency of the death of George Henry Warren, Jr. which would have the same effect as his resignation or disqualification to act as trustee.

We submit that the assessment of one-half of the trust fund in this case to the co-trustee of the New York trust fund simply because as an individual he resides in Rhode Island is an "illegal exaction disguised under the name of taxation" under the XIVth Amendment.

The appeal of the appellants should be granted.

Respectfully submitted,

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